## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### Opinions Below.

The District Court of the United States for the Southern District of Texas rendered two memoranda opinions on February 13, 1939 (R. 238) and August 13, 1940 (R. 657). Its Findings of Fact (R. 659), Conclusions of Law (R. 671) and Final Decree (R. 672) were entered October 1, 1940.

The United States Circuit Court of Appeals for the Fifth Circuit rendered its opinions in this case on January 27, 1943 and on April 6, 1943 on Petition for Rehearing. The opinions are set forth on pages 3114-3126 and 3185-7 of the Record. The former is now reported at 133 Fed. (2) 69.

### Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Fifth Circuit on January 27, 1943 and on April 6, 1943 on Petition for Rehearing. A Writ of Certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, 43 Stat. 938).

### Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented, see this Petition (pp. 1 to 13).

**Specification of Errors.**

1. The Circuit Court of Appeals for the Fifth Circuit erred in affirming the decree entered by the District Court of the United States for the Southern District of Texas.

2. The Circuit Court of Appeals for the Fifth Circuit erred in not reversing said decree in the District Court.

3. The Circuit Court of Appeals for the Fifth Circuit erred in not holding that the District Court must give "full faith and credit" to the Tule partition decree *in rem* as *res judicata* and binding upon the world as to title to 127,000 mineral acres, under Section 1, Article 4 of the Constitution of the United States, under Revised Statutes, Section 905 (28 U.S.C.A. 687), under the decisions of this Court, and under the established law of the State of Texas.

4. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the established law of the State of Texas that the Tule partition decree *in rem* was an estoppel by judgment against the termination of the mineral trust on Mrs. King's death.

5. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the laws of the United States and of the State of Texas that Mrs. King's will effectively disposed of the beneficial interest and designated the uses, purposes and beneficiaries under the mineral trust of March 1, 1919 and that such mineral trust did not terminate on her death in six years, but is valid for the entire 50-year term from March 1, 1919.

6. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the established law of the State

of Texas that the Humble 1933 leases were invalid for want of title in the residuary trustees as lessors.

7. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the established law of the State of Texas that the Humble 1933 leases were invalid because the residuary trustees under Mrs. King's will had no power to conduct mining operations which would "waste" the minerals.

8. The Circuit Court of Appeals for the Fifth Circuit erred in not holding under the established law of the State of Texas that the Humble 1933 leases were also invalid because the residuary trustees under Mrs. King's will had no power to lease or sell the minerals upon royalties, rentals, and installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust in March, 1935.

**Summary of Argument.**

The points of the Argument follow paragraphs 3 to 8 of the Specification of Errors above.

## ARGUMENT.

### I.

### The Circuit Court of Appeals failed to give "full faith and credit" to the Tule partition decree in rem.

The San Salvador del Tule Grant partition suit was one of the largest and most important partition suits in the history of Texas. It involved nearly half a million acres and was originally filed in 1910 to quiet title to land in Hidalgo and Cameron Counties, Texas, originally granted by the Spanish Crown in 1797 (R. 2737). There were nearly 2,000 claimants in the Grant, of whom Mrs. King was by far the largest (R. 2249). The litigation was conducted before John I. Kleiber, Master in Chancery, over a period of 20 years. Mrs. King was represented by James B. Wells, the attorney who drew both her mineral trust and will, and who also represented other parties-defendant (R. 832, 883, 2248, 3104).

The litigation was largely financed by Mrs. King in her lifetime and by her residuary trustees after her death. She advanced over $20,817.05 and her residuary trustees advanced over $27,180.59 to the Master, apart from her large attorneys' fees (R. 881-2, 2925-7).

An amended complaint was filed in April, 1924, summons was issued, and publication was had upon 700 defendants, as well as upon "Unknown Heirs" and "Unknown Owners," in full compliance with the Texas statutes (R. 2292-7).

In 1930, five years after Mrs. King's death, Kleberg, *acting as mineral trustee,* intervened in this case claiming

title to 129,267.4 mineral acres (R. 2743). He was represented by attorneys Edward R. Kleberg and J. K. Wells (R. 2745). He attached a copy of the mineral trust to his intervening petition (R. 2746). He claimed to be the owner individually as to 3/32nds minerals and to be the owner as trustee of the remaining 29/32nds minerals (R. 2743). On the same date the residuary trustees also intervened claiming ownership in the "surface" to the same lands (R. 2753).

A certified copy of the original final decree of partition entered July 21, 1930 has been transmitted to this Court. It shows conclusively that the Court adjudicated full title to 127,972.8 mineral acres in the King Ranch in the manner prayed in Kleberg's petition, *i.e.*, 3/32nds to him individually and 29/32nds to him *as mineral trustee*. The mineral trust of March 1, 1919 was incorporated by specific reference in the decree. The crucial paragraphs of the decree appear on pages 514-7 of the record. They show that Kleberg, *as mineral trustee*, and the eight residuary trustees under Mrs. King's will "and those hereafter claiming or to claim by, through, or under them" were all perpetually enjoined and restrained from asserting "any right or title acquired prior to the date hereof" (R. 515).

This partition decree *in rem* has never been appealed or attacked and stands unimpaired to this date. The defendant beneficiaries took deeds from the residuary trustees upon distribution of the residuary trust (R. 301, 387, 2084), and have relied upon the Tule decree for their titles to the "surface" lands ever since the decree was rendered. All defendants in their pleadings admitted that the Tule decree was a valid partition decree (R. 591, etc.).

It is the established law of Texas (Art. 6100[1] of Tex.

[1] See Appendix.

Rev. Stat. in effect since 1879) that a partition decree vests in each distributee a title as fully and effectually as a deed of the parties could vest the same. It is unnecessary to cite the Texas cases holding that a valid partition decree binding by publication service of process upon all "Unknown Owners" and "Unknown Heirs" is a decree *in rem* binding as *res judicata* upon the world and as an estoppel by judgment upon all parties interested in the real estate so partitioned and those in privity with them. *Carnes* v. *Carnes*, 64 S. W. 877; *Parks* v. *Knox*, 130 S. W. 203.

That the Federal Courts must give "full faith and credit" to the Tule partition decree *in rem* as *res judicata* binding upon the world is clearly established under Article 4, Section 1 of the Federal Constitution, under Revised Statutes, Section 905 (28 U.S.C.A. 687), and under the decisions of this Court.

*Cooper* v. *Newell*, 173 U. S. 555, 567;

*Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183;

*Davis* v. *Davis*, 305 U. S. 32;

*Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268;

*Bradford El. Light Co.* v. *Clapper*, 286 U. S. 145, 155.

Plaintiffs pleaded the Tule partition decree *in rem* in the District Court not only as *res judicata* as to the 127,000 mineral acres therein adjudicated to Kleberg *as mineral trustee*, but also as an estoppel by judgment against the holding subsequently made by the District Court and affirmed by the Circuit Court of Appeals that the mineral trust terminated in 1925 (R. 617-8). Obviously a valid judgment which adjudicated the continuance of the mineral trust and which was entered in 1930, *five years after*

*Mrs. King's death,* is an effective estoppel by judgment against the contradictory contention that the mineral trust had terminated five years earlier on Mrs. King's death in 1925, for this was an inevitable result of the adjudication of title in Kleberg *as mineral trustee.*

*Cromwell* v. *County of Sac,* 94 U. S. 351;
*New Orleans* v. *Citizens' Bank,* 167 U. S. 371;
*Fayerweather* v. *Ritch,* 195 U. S. 276.

The Circuit Court of Appeals in its opinion held that the residuary trustees, who became actual parties to the suit, could not act "in derogation of the terms" of the will and thereby bind the beneficiaries. It is the established law of Texas (as well as other states) that where trustees, as here, hold full title to the trust estate, the beneficiaries are in privity with them and are bound by a decree involving the trust property.

*Village Mills Co.* v. *Houston Oil Co.,* 241 S. W. 122;
*Lipsitz* v. *First Nat'l Bank,* 288 S. W. 609;
*Chicago R. I. & P. Ry.* v. *Schendel,* 270 U. S. 611;
*Collins* v. *Crawford,* 103 S. W. 537;
*Scott* v. *Scott,* 139 N. E. 70;
*Kenyon* v. *Davis,* 69 Atl. 62.

That both the mineral trustee and the residuary trustees necessarily held the full title in fee simple to the minerals and "surface" respectively is uncontrovertible in this case. Mrs. King as beneficiary during her life and her residuary trustee after her death for 10 years and her beneficiaries thereafter, named in her will, held the "beneficial interest" under the mineral trust, *i.e.,* the right to receive the entire proceeds of the liquidation of the minerals; but they held no title in the minerals themselves during the 50-year term, the full fee simple title thereto being in

the mineral trustee. As to the mineral trust, Kleberg, *as mineral trustee* could not have conveyed fee simple determinable estates in the minerals to the successive lessees under the mineral leases made by him with Mrs. King's approval in her lifetime, as the defendants all pleaded (R. 207, 443-4, 457-9, 529-30, 551, etc.), if he had not had full title in fee simple to the minerals. As to the residuary trustees, they could not have sold large portions of the "surface" lands in Mrs. King's estate if they had not likewise held full title in fee simple thereto (R. 1837-2041). Indeed the Circuit Court of Appeals in sustaining the Humble 1933 leases necessarily held that the residuary trustees had full title in fee simple for this purpose. It has always been the law in Texas (as in all other common law jurisdictions) that a trustee holds whatever title is necessary to effectuate the trust.

*Parks* v. *Powell*, 56 S. W. (2d) 323;
*Sims* v. *McMullan*, 22 S. W. (2d) 313;
*Fidelity Lbr. Co.* v. *Bendy*, 245 S. W. 981;
*Montgomery* v. *Truehart*, 146 S. W. 284;
Restatement of Law of Trusts, Vol. 1, § 88.

The Tule decree does not pretend to construe the meaning or terms of the mineral trust; nor does it pretend to adjudicate the respective rights of the beneficiaries who took the beneficial interest thereunder by Mrs. King's will. This, however, does not prevent the Tule decree from validly *partitioning* the minerals in 127,000 acres to Kleberg *as mineral trustee.*

In some of the cases where the beneficiaries are bound because they are in privity with their trustees, the decree may not necessarily adjudicate any of the rights of the beneficiaries *inter se;* but this does not prevent the decree from being binding upon the group or class of beneficiaries

as a whole. *James* v. *James,* 164 S. W. 47, cited by defendants, was a partition suit in which such a situation arose. The Texas Court said, page 48:

> "It is frequently the case that, in partition suits, a group of litigants who are jointly entitled to a certain share of property do not wish to partition between themselves, but merely ask that they jointly be awarded a certain share."

The Court held that the decree in that case made no adjudication of the rights of the beneficiaries *inter se,* but was binding up the group as a whole. *Parks* v. *Knox,* 130 S. W. 203.

The case of *Village Mills Co.* v. *Houston Oil Co.,* 186 S. W. 785, also cited by defendants, held that a decree binding upon a trustee with title also binds all beneficiaries in a partition suit, even if they are not made parties to the suit. *Lipsitz* v. *First Natl. Bk.,* 288 S. W. 609. Indeed the Circuit Court of Appeals in holding that the residuary trustees had power to enter into the Humble 1933 leases could *only* have proceeded on the theory, since the beneficiaries did not themselves join therein, that they were in privity with the residuary trustees and were bound thereby.

Thus the refusal of the District Court and the Circuit Court of Appeals in this case to hold that the Tule partition decree *in rem* was effective as *res judicata* and as a valid estoppel by judgment plainly fails to give "full faith and credit" thereto under the Federal Constitution and Revised Statutes, and under the established law of Texas. Such a decree binds not only the actual parties to the litigation but all other "Unknown Owners" and "Unknown Heirs" in general, and all beneficiaries of both the mineral trust and the residuary trust in particular, even though the several rights of such beneficiaries were not

determined and adjudicated *inter se.* (Vernon's Ann. Civ. Stat., Art. 6085.) (See appendix.)

It follows that this Court has jurisdiction, not only under the Federal Constitution and Statutes but also under the cases hereinafter cited requiring the Federal Courts to follow the local law of the state courts in matters affecting real property rights *in rem,* to issue the Writ of Certiorari herein sought and to reverse the erroneous decision in the courts below.

This is a quiet title proceeding; and under the Tule decree the title to at least 127,972.8 mineral acres in the King Ranch should be affirmed in the mineral trust of March 1, 1919, and a successor trustee should be appointed to continue to administer the mineral trust during the balance of the 50-year term from March 1, 1919 to March 1, 1969, as prayed in the complaint (R. 264).

## II.

**The Circuit Court of Appeals refused to follow the Texas law in holding that the mineral trust failed and terminated on Mrs. King's death.**

Although both the District Court and the Circuit Court of Appeals expressed some uncertainty as to whether the mineral trust was ever validly created in the first place and thereafter continued to be effective during Mrs. King's lifetime, the defendants themselves pleaded that the mineral trust was valid from its inception in 1919 to Mrs. King's death in 1925 (R. 186-8, 195, 205, etc.); and all of the defendants admitted in their pleadings that Kleberg, *acting as mineral trustee,* had validly conveyed fee simple determinable estates in the minerals "with the full knowledge and consent of Mrs. King" during her lifetime (R.

207, 443-4, 457, 529-30, 551, etc.)). Indeed in the light of the undisputed fact, as admitted in defendants' pleadings (R. 443, etc.), that the Humble Company held on the date of Mrs. King's death the fee simple determinable title to all the minerals in the King Ranch under mineral leases made by Kleberg *acting as mineral trustee* in 1922-4 (and earlier) (R. 2822-3036), which mineral title the Humble had acquired and developed at a cost to it of over $350,000 (R. 2382, 3095-7), the defendants' position that the mineral trust was valid and effective during Mrs. King's lifetime could not have been seriously controverted by them; and the doubt expressed by the District Court and the Circuit Court of Appeals on this point only serves to cast a shadow upon its entire position with regard to the mineral trust.

The Circuit Court of Appeals based its holding that the mineral trust terminated on Mrs. King's death upon the erroneous theory that in her will she had made no effective disposition of the mineral interest and had designated no uses, purposes and beneficiaries under the mineral trust (R. 3125-6). We think this cannot be sustained.

The Supreme Court of Texas has squarely held in *Humphreys* v. *Gammon*, 113 Tex. 247, 254 S. W. 296, and *Munsey* v. *Mills*, 115 Tex. 469, 283 S. W. 754, that such an outright conveyance as the March 1, 1919 mineral trust is a valid "severance" of the minerals from the "surface" of the land. The rule established in these cases has been followed by this Court. *Burnet* v. *Harmel*, 287 U. S. 103; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279; *Downman* v. *Texas*, 231 U. S. 343. That Mrs. King's will, under its provisions establishing the residuary trust for ten years and thereafter distributing the residuary trust property to her descendants in the broadest possible language, effectively

disposed of the beneficial interest and designated the "purposes, uses and beneficiaries" to take the entire beneficial interest under the mineral trust would seem too clear for argument. This is the very purpose of a residuary clause. *Mayer* v. *Am. Trust Co.*, 222 U. S. 295.

Indeed if these very same provisions of Mrs. King's will were effective to pass the (entire) mineral title (whether severed or unsevered) as the District Court and the Circuit Court of Appeals both held, it must irresistibly follow that the very same clauses were effective to pass the (lesser) beneficial interest under the mineral trust. The residuary trustees themselves distributed nearly 1,000,000 acres of land under the various residuary clauses of the will (R. 331-3, 395-407, 2095-2108), thus showing that the will was effective to dispose of the entire beneficial interest in the mineral trust, exactly contrary to the Circuit Court's opinion.

It follows that, since the mineral trust did *not* terminate on Mrs. King's death, the "otherwise" clause at the end of the mineral trust instrument never became operative. This clause in no event could have "prevented" Mrs. King from disposing of the beneficial interest under the mineral trust by her will, as the Circuit Court correctly says (R. 3122). Neither did the word "hereafter" prevent Mrs. King's will from designating and disposing of her beneficial interest under the mineral trust. For under Texas law a will is just "a piece of paper" until the testator's death and only becomes a will and operates as such on and after that date. *Jones* v. *Eastham*, 36 S. W. (2) 538 and other cases there cited.

Moreover the *twice* repeated reference in the mineral trust itself to minerals which "*my Estate* shall, *after my death*, in any manner * * * own" (R. 89, 91) shows *con-*

*clusively* that Mrs. King wished the mineral trust to go on *after her death* "for the full term of FIFTY (50) YEARS from this, the First (1st) day of March, A. D. 1919." (R. 92).

It will be noted in the Circuit Court of Appeals' original opinion filed January 27, 1943, that it held not only that the mineral trust had terminated on Mrs. King's death, but that the District Court had decided that the severed minerals had somehow become "merged in and a part of the (surface) land" (R. 3126). Plaintiffs filed a petition for rehearing establishing beyond question that the District Court had not held that there was any such "merger" of several minerals with "surface" land either on Mrs. King's death or subsequently on the authority of the *Humphreys* and *Munsey* cases (R. 3127); and plaintiffs there pointed out that even if the mineral trust had terminated on Mrs. King's death, there would have been no "merger" either (a) of the severed minerals with the "surface" land or (b) of the legal title to the minerals with the equitable title to the minerals under the law of Texas. But we deem this issue of "merger" to be utterly irrelevant here.

For whether or not there was any such "merger" is a question which cannot arise if Mrs. King's will did effectively pass the beneficial interest in the mineral trust. And even if the mineral trust did terminate, whether the minerals were merged with the surface or not is also irrelevant to the validity of the Humble 1933 leases, since if valid these leases conveyed the fee simple determinable mineral title to the lessee, whether previously "merged" or not. We therefore do not discuss the issue of merger here.

What we are pointing out is that the decision appealed from holding the mineral trust terminated on Mrs. King's death is unsustained by reference to merger or by any other valid reasoning or authority. Moreover it is squarely in conflict with the Tule partition decree *in rem*, as we have shown in the prior section of this argument. For obviously the mineral title in 127,000 acres could not have been quieted in Kleberg *as mineral trustee* in 1930 if there were no mineral trust then in full force and effect.

It might also be added that the purported termination of the mineral trust by Kleberg's deed of July 3, 1928, in which he expressed his present "intention to merge the title" of the 29/32nds minerals "with the title to respective (surface) lands, forever free" of the mineral trust (R. 106-8), was utterly inconsistent with the theory that the mineral trust had terminated three years earlier on Mrs. King's death in 1925. If the minerals had merged in the lands automatically on Mrs. King's death, Kleberg *acting as mineral trustee* would certainly not have made the July 3, 1928 deed. The Humble Company in its pleadings attempted to breathe life into this deed by alleging that it substituted the residuary trustees as *successor mineral trustees* to Kleberg under the mineral trust (R. 210). Humble thus admitted: (1) that the mineral trust was still valid on July 3, 1928, and (2) that a successor trustee to Kleberg should be appointed.

The Circuit Court of Appeals squarely rejected both contentions and correctly held that the July 3, 1928 deed was "without effect, for if the trust was in fact and in law continued, Kleberg had no authority to bring it to an end, neither did he have any to appoint substitute trustees. It is quite plain that the residuary trustees did not consider themselves as (successor) mineral trustees." But this

abortive deed, especially when combined with Humble's pleadings, plainly constitutes an admission that the mineral trust survived Mrs. King's death, thus supporting the like estoppel by judgment arising from the Tule partition decree.

Perhaps equally conclusive is Kleberg's continual reference to his own powers under the mineral trust as "coupled with an interest" which appeared in most of the 200 mineral leases and other mineral instruments which he signed while *acting as mineral trustee* under the mineral trust *both before and after* Mrs. King's death (R. 2535-3025). It has always been the law that powers "coupled with an interest" or "coupled with a trust" survive the settlor's (Mrs. King's) death.

*Hunt* v. *Rousmanier*, 8 Wheat. 174;
*Peter* v. *Beverly*, 10 Pet. 532;
*Taylor* v. *Bentham*, 5 How. 233;
*Wilson* v. *Snow*, 228 U. S. 217.

The Texas cases are similar.

*Jones* v. *Guy*, 71 S. W. (2) 913;
*Cano* v. *Cuellar*, 95 S. W. (2) 155;
*Broadway* v. *Stone*, 15 S. W. (2) 230;
*Wiener* v. *Zwieb*, 141 S. W. 771;
*Slay* v. *Gose*, 233 S. W. 348.

We conclude that under the established law of Texas the mineral trust survived Mrs. King's death and that the contrary holdings by the District Court and the Circuit Court of Appeals are erroneous and should be reversed. We cite below the authorities in this Court holding that

the Federal Courts must follow the law of the State of Texas in this case in quieting the title to Texas real estate.

## III.

**The Circuit Court of Appeals erred in holding that the Humble 1933 mineral leases were valid.**

If the foregoing contentions in this brief are sustained, it is obvious that the Humble 1933 mineral leases were invalid because they were not made by the mineral trustee, he having died in 1932 and no successor having been appointed.

It is our further position, however, that even if the residuary trustees had held the mineral title on Sept. 26, 1933, the Humble leases made on that date were invalid as beyond the power of the residuary trustees and as constituting a breach of trust, for the following reasons:

1. The residuary trustees under Mrs. King's will held merely the *general* power to lease or sell the trust estate. Not a drop of oil had been developed on the King Ranch in Mrs. King's lifetime. Under the will, therefore, the residuary trustees held no *special* power to conduct mining operations or to enter into mineral leases and thereby "waste" the minerals.

2. The residuary trustees under Mrs. King's will held the mere *general* power to lease or sell the trust estate, without reference to minerals as such or to mineral leases. There was no *special* power granted the residuary trustees to lease or sell minerals, as in the Humble 1933 leases, upon

royalties, rentals or installments payable for 18½ years and on in perpetuity beyond the termination of the trust, thus depriving the beneficiaries of their unclouded fee simple title to the minerals to which they were entitled on March 31, 1935.

Before turning to a consideration of the foregoing matters, we first cite the cases in this Court holding that the Federal Courts must follow and apply the established law of the State of Texas in which the real property here under consideration lies. These cases, with which this Court is so familiar as to require no further comment, include the following:

*Erie Railway Co.* v. *Tompkins,* 304 U. S. 64;
*Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202;
*City Service Co.* v. *Dunlap,* 308 U. S. 208;
*Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.,* 313 U. S. 487.

This requirement that the Federal Courts follow the state law is particularly applicable to this case, for not only does the real property here involved lie in the State of Texas, but both Mrs. King's mineral trust and will, and all of the actions of the mineral trustee and residuary trustees thereunder, took place in and are subject to the law of Texas. We discuss the foregoing objections to the Humble 1933 leases in more detail, as follows:

1. It is plain that under the law of Texas the residuary trustee had no authority under Mrs. King's will to enter into the Humble 1933 leases if by so doing waste of the minerals was committed. The authorities are collected and considered in *Avis* v. *First Natl. Bk. of Wichita Falls,* decided by the Supreme Court of Texas on February 24,

1943 and cited to the Circuit Court of Appeals in this case by plaintiffs' supplement to petition for rehearing (R. 3159). This decision was by the Supreme Court of Texas sitting *en banc* with its two Commissions of Appeals to constitute a full court of nine members. We can give no citation to this case because it is still pending before the Texas Supreme Court on petition for rehearing. The opinion is therefore printed as an appendix.

In the *Avis* case "the sole question" was whether the trustee had "power to execute mineral leases on lands held by it as such Trustee." Under the Avis will the trustee had "full, ample, complete, and absolute power to manage, control, sell, and dispose of said trust property, rent, make leases thereon, and in every way handle same." The Supreme Court of Texas held that the power to "make leases" only "applies to ordinary leases, and not to mineral leases"; and that the power to "sell said trust property" only applies to *sales* and "does not include the power to make an oil and gas lease." The Supreme Court concluded:

> "We therefore hold that the First National Bank of Wichita Falls, as Trustee, does not have the power to make a mineral lease on the land held in trust by it. * * * Judgment is here rendered construing this will as above indicated."

The case at bar is much stronger and more compelling than the *Avis* case. Shortly *after* Mrs. King executed her will providing for the future establishment of an ordinary testamentary trust, in which she definitely refrained from giving to her residuary trustees the power to execute mineral leases, Mrs. King executed her mineral trust which was prepared by the same lawyer (R. 832, 3104) in which she conferred plenary authority upon

her mineral trustee to lease or sell their minerals. Her *deliberate* failure, therefore, to confer any power to execute oil and gas leases upon her residuary trustees, followed within a few months by her positive grant of the fullest powers to make oil and gas leases upon her mineral trustee, leaves no room whatever for an implication of powers which were so clearly and intentionally *denied* the residuary trustees and so specifically and intentionally *given* to the mineral trustee. Thus the doctrine of the *Avis* case is much more strongly applicable to Mrs. King's will than to the Avis will.

Before considering the Circuit Court of Appeals' discussion of this case, we point out that in the *Avis* case the earlier Texas authorities to the same effect were cited and relied upon:

*Bean* v. *Bean*, 79 S. W. (2d), 652;
Thornton Oil & Gas (4th Ed.) Vol. 1, p. 762.

See also:

*Lone Acre Oil Co.* v. *Swayne*, 78 S. W. 380 (aff'd 86 S. W. 740).
*Whitaker* v. *Surtees*, 248 S. W. 432;
*Midland County* v. *Slaughter*, 130 S. W. 612.

This is also the law of the other states:

*Ohio Oil Co.* v. *Daughetee*, 240 Ill. 361; 88 N. E. 818;
69 L. R. A. 986;
*Lanyon Zinc Co.* v. *Freeman*, 68 Kans. 691; 75 Pac. 995;
Perry on Trusts, vol. 2, p. 282, § 774;
*Williamson* v. *Jones*, 43 W. Va. 562; 27 S. W. 410;
*In re Hoysradt*, 45 N. Y. S. 841;
65 C. J. 664, p. 791;
36 L. R. A. (N. S.) 1108.

The Circuit Court of Appeals, while admitting that the *Avis* case was correctly decided, attempts to distinguish it upon the ground that the making of oil leases would constitute "waste" under the Avis will but not under Mrs. King's will. The reason given is that there is a "conflict between the interest of the life tenant and the remaindermen beneficiaries" under the Avis will which the Circuit Court of Appeals does not find in Mrs. King's will. An examination of the two wills dispels any such notion. Under the Avis will the widow was a tenant for life or for years (in the event of her remarriage); and upon the termination of the tenancy for years by re-marriage the widow was a one-fourth residuary remainderman, the remaining three-fourths being given to the testator's seven children, subject, however, to a gift over to their "natural heirs" under the second paragraph of Article 7 of the will. This was practically identical with the situation under Mrs. King's will. She gave a ten-year annuity to the plaintiffs (and others) with the remainder over to the plaintiffs (and others) subject to divestment to their "living descendants" (and the husband of one) if they did not survive the trust period (R. 75-81).

The effect of the Avis decision was thus to hold that the executory limitation to third persons, i. e., the "natural heirs" of the children under Article 7, was the very basis for the Supreme Court's decision that the trustee must not commit waste as to them. In other words "waste" is defined as anything which *might* injure anyone "who has a right or possibility of future possession" of the estate. Tiffany, Real Property, 2nd ed., p. 950.

Turning to Mrs. King's will, it would equally be "waste" for the residuary trustees to deplete the mineral deposits which the "living descendants" of the remaindermen

*might* take by way of an executory limitation, precisely similar to the limitation to "natural heirs" in the Avis will. As the Supreme Court of Texas held in the *Avis* case, citing *Williamson* v. *Jones, supra,* and *Ohio Oil Co.* v. *Doughetee, supra,* equity will enjoin a *threatened future waste;* and it is this threat of future waste which puts the lease beyond the trustees' powers on the date upon which it is made.

Certainly it is no answer to the *Avis* case to say that the trustee may commit waste by leasing the minerals because the proceeds of the waste might go to the same persons as the minerals themselves might have gone if there had been no waste. In other words, the remainderman can object to the destruction of his remainder interests by waste *even though at the time the waste is committed he is receiving an annuity from the estate.* Under Mrs. King's will the beneficiaries received annuities which in the case of plaintiffs were limited to $250 per month (R. 71-2). It was utterly unnecessary to waste the minerals in order to pay the annuities (comprising only 4% of the gross income of the estate) under Mrs. King's will. It is not the failure to receive the proceeds of the waste during the period of the trust but the wasting of the remainder interests themselves which is condemned by the Supreme Court of Texas in the *Avis* and other earlier cases.

One more word might, perhaps, usefully be said. The Circuit Court in both its original opinion (R. 3119) and opinion on rehearing (R. 3187) speaks of Kleberg's "controlling voice in the management of the trust" and his "power of final and binding decision as to any of their (the trustees') duties or acts." Kleberg unquestionably had the right to cast the deciding vote in the event of any

"difference of opinion" *between* the trustees (R. 83), but he could not *expand* the *general* powers of the trustees to suit himself thereby. It has always been the law that any clause giving trustees *power to approve their own acts,* especially if inserted in a will by the same attorney who drew it and who made himself a trustee thereunder (in this case James B. Wells), would be against public policy and void. Restatement of the Law of Trusts, Secs. 187(k), 222(d). *Kramer* v. *Sommers,* 93 S. W. (2) 460.

So also defendants' argument that Mrs. King's will gave the residuary trustees the general power to do everything she "would or could do if living" (R. 71), or which an owner similarly situated might do "not inconsistent with the provisions of this will" (R. 81-3), has repeatedly been held *not* to add any *missing special powers* to the will. *In re Ruggles Estate,* 266 N. W. 332; *In re Hall's Estate,* 216 N. Y. S. 598; *In re Andrus Will,* 281 N. Y. S. 831.

We contend therefore:

(a) That under the established law of Texas the residuary trustees had no power to enter into the Humble 1933 mineral leases; and

(b) That under the decisions of this Court the Federal Courts are bound to apply this law of the State of Texas to Mrs. King's will in quieting the title to Texas realty.

It follows that the decision affirmed by the Circuit Court of Appeals should be reversed on this ground.

2. It is the settled law of Texas that the mere *general* power to lease or sell the trust estate does not give the trustees the *special* power to lease or sell minerals or other realty upon royalties, rentals or installments pay-

able for 18½ years and possibly on in perpetuity beyond the termination of the trust.

*Wisdom* v. *Wilson*, 127 S. W. 1128;
Vernon's Ann. Civ. Stat., Art. 4192(5);
*Pure Oil Co.* v. *Clark*, 40 S. W. (2d) 962;
*Rogers* v. *Harris*, 171 S. W. 809;
Restatement of Law of Trusts, § 189;
Scott on Trusts, § 189.2.

The cases in other jurisdictions sustaining the same rule are legion:

*In re Armory Board*, 60 N. Y. S. 882;
*In re Hubbell Trust*, 113 N. W. 512;
*Wilmington Tr. Co.* v. *Carrow*, 125 Atl. 350;
*St. Louis Union Tr. Co.* v. *Van Raalte*, 259 S. W. 1067;
*Russell* v. *Russell*, 145 Atl. 648;
*North* v. *Augusta Real Est. Asso.*, 155 Atl. 36;
*In re Caswell's Will*, 222 N. W. 235;
*South End Warehouse* v. *Lavery*, 107 Pac. 1008;
*Hunt* v. *Lawton*, 245 Pac. 803.

In the event the trustee does make a lease extending beyond the trust period, the beneficiaries need only bring an action to terminate that portion of the lease after the trust has ended and the court will promptly grant the beneficiary the relief sought. *In Re McCaffrey's Est.*, 3 N. Y. S. 96; *In Re Opening of 110th Street*, 81 N. Y. S. 32; *Cox* v. *Kinston Carolina Lbr. Co.*, 95 S. E. 623.

The Texas case of *Wisdom* v. *Wilson*, 127 S. W. 1128, is peculiarly applicable because in that case the trustee had a discretionary power of *sale* and attempted to *sell* the real estate upon deferred payments extending beyond the

trust term. The Texas court held that the sale was invalid, citing Perry on Trusts, § 786, which reads:

> "The power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be made for cash."

The Texas court condemned the sale on instalments because the beneficiary would have to accept his property burdened with this transaction, in effect prolonging the trusteeship and depriving him of his right to a reasonably prompt settlement and distribution as the testator intended. *That is precisely the situation here.*

This case disposes of the defendants' contention that mineral leases are really "sales" and not leases; for it matters not whether they are sales upon installments or leases upon rentals or royalties, they are equally condemned under the Texas law.

Numerous other Texas cases have held that leases by a guardian beyond the termination of his ward's minority are voidable as to the portion beyond the date of the ward's coming of age.

*Pure Oil Co.* v. *Clark*, 40 S. W. (2d) 962;
*Rogers* v. *Harris*, 171 S. W. 809;
*Jackson* v. *O'Rorke*, 98 N. W. 1068;
Vernon's Ann. Civ. Stat., Art. 4192(5).

In the case of Mrs. King's will it was unquestionable that the residuary trust had no more than 18 months to run when the Humble leases were made on Sept. 26, 1933. Nevertheless these leases contain a binding preliminary term of 20 years, which therefore extended the leases a *minimum* of 18½ years beyond the termination of the trust. If minerals were discovered and developed during

the primary term, the lease permitted the Humble Company to maintain them on the area under production in perpetuity so long as oil should be produced therefrom.

That this is squarely in violation of the Texas law and that the decisions of this Court require the Federal Courts to follow the Texas law in this respect appear to be beyond controversy.

We conclude that this Court has jurisdiction and that the decisions below should be reversed on this ground.

## CONCLUSION.

We conclude, therefore:

1. That the courts below failed to give "full faith and credit" to the Tule partition decree *in rem* by failing to decree the mineral title in 127,000 mineral acres here involved to be in Kleberg and his successors *as mineral trustees* under Mrs. King's mineral trust, and also by failing to give the Tule decree the effect of an estoppel by judgment as to the continued validity of the mineral trust after Mrs. King's death.

2. That the courts below failed to follow the settled law of the State of Texas by failing to hold that Mrs. King's will effectively disposed of the beneficial interest and designated the uses, purposes, and beneficiaries under the mineral trust.

3. That the courts below failed to follow the established law of Texas as settled by the *Avis* and other Texas decisions by failing to hold that the mere *general* power to lease and sell the trust estate did not give the residuary

trustees under Mrs. King's will the *special* power to enter into the Humble 1933 mineral leases which constituted waste of the estate.

4. That the courts below failed to follow the established law of Texas by failing to hold that the mere *general* power to lease or sell real estate did not give the residuary trustees under Mrs. King's will the *special* power to enter into the Humble 1933 mineral leases providing for the payment of rentals and royalties for a minimum of 18½ years and possibly on in perpetuity beyond the terms of the residuary trust.

Petitioners therefore pray that the decree of the District Court as affirmed by the Circuit Court of Appeals for the Fifth Circuit should be reversed and that this Court should grant the Writ of Certiorari herein prayed.

Respectfully submitted,

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